Supreme Court, U. S.
FILED
JUN 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1716

BARRY LIPSITZ, ROBERT SEIPLE, C. M. SCHNEIDER, as Trustees of the GOLD COAST ELECTRICAL JOINT APPRENTICESHIP AND TRAINING TRUST FUND,
Petitioners,

versus

MICHAEL COSTELLO, CHARLES PEREZ and ROBERT HORAN, as Trustees of the GOLD COAST ELECTRICAL JOINT APPRENTICESHIP AND TRAINING TRUST FUND,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph H. Kaplan
Joseph C. Segor

KAPLAN, DORSEY, SICKING & HESSEN, P.A.
Attorneys for Respondents
P. O. Drawer 520337
Miami, Florida 33152
(305) 325-1661

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TOPICAL INDEX

Page

QUESTIONS PRESENTED 1-2

STATEMENT OF THE CASE 2-4

REASONS FOR DENYING THE WRIT:

I THE DECISION OF THE U. S. COURT OF APPEALS, FIFTH CIRCUIT, INTERPRETING § 302 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 IS A CORRECT INTERPRETATION AND NEED NOT CONFLICT WITH THE OPINION OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT 4-6

II. EVEN IF THE COURT DOES FIND A CONFLICT IN THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS, SECOND CIRCUIT AND THE FIFTH CIRCUIT, THIS MATTER IS NOT A VITAL ONE NOR IS IT OF GREAT IMPORTANCE 6-7

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF CITATIONS

CASES

G. & M. Restaurants Corp. v. Tropical Music Service, Inc., 161 So.2d 556 (Fla. 2nd DCA 1964) 3

Independent Association of Mutuel Employees of New York State v. New York Racing Association, 398 F.2d 583 (2nd Cir. 1968) 5,6,7

STATUTES

Labor Management Relations Act § 302 1,3,4,5,7

Labor Management Relations Act § 302(c)(5)(B). 2,3,4

Labor Management Relations Act § 302(c)(6) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1716

BARRY LIPSITZ, ROBERT SEIPLE, C. M. SCHNEIDER, as Trustees of the GOLD COAST ELECTRICAL JOINT APPRENTICESHIP AND TRAINING TRUST FUND,

Petitioners,

versus

MICHAEL COSTELLO, CHARLES PEREZ and ROBERT HORAN, as Trustees of the GOLD COAST ELECTRICAL JOINT APPRENTICESHIP AND TRAINING TRUST FUND,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE U. S. COURT OF APPEALS, FIFTH CIRCUIT, INTERPRETING § 302 OF THE LABOR MANAGEMENT RELATICNS ACT OF 1947, IS A CORRECT INTERPRETATION AND NEED NOT CONFLICT WITH THE OPINION OF THE U. S. COURT OF APPEALS, SECOND CIRCUIT?

II

WHETHER THIS COURT SHOULD REVIEW THE DECISION OF THE FIFTH CIRCUIT IF IT DOES FIND A CONFLICT WITH ANOTHER COURT OF APPEALS, WHERE THE MATTER IS NOT A VITAL ONE, NOR ONE OF GREAT IMPORTANCE?

STATEMENT OF THE CASE

On August 27, 1962, five days prior to the effective date of the 1962 Collective Bargaining Agreement, a document entitled "Gold Coast Electrical Joint Apprenticeship and Training Trust Fund Agreement" was executed. It is this document that is the subject of the dispute at hand. Marshall E. Williams, then the Business Agent for the Union, and Karl Behnke, Chapter Manager of the Employer, executed this document.

The dispute centers around § 10 of the Trust Fund Agreement which provides that:

> Matters pertaining to any employees of this Fund shall be the responsibility of the Employer's Trustees only.

The Union Trustees had no say regarding the employment or salary of any of the Fund's employees. Union Trustees, after many unsuccessful attempts at having § 10 of the Trust Agreement deleted, brought an action under the Declaratory Judgment Act seeking judicial determination that this provision violates § 302 (c)(5)(B) and § 302 (c)(6) of the Labor Management Relations Act of 1947, in that it vests control of the employees and their salaries, under the Fund, in the Employer Trustees. Defendants below, Petitioners here, contend that the Trust Fund is not controlled by

§ 302 of the Taft-Hartley Act, which requires that Management and Labor have an equal vote in the operation of the Fund.

It was not until the Court requested that the parties submit proposed Findings of Fact and Conclusions of Law, that Defendants, after the trial, claimed that the Trust Fund Agreement was not a "written agreement" within § 302(c)(5)(B) of the LMRA, as the Agreement had not been submitted to the Union membership.

There was testimony at the trial that the Trust Fund Agreement was not required to be brought before the Union membership for ratification. Defendants' attorney stated, at the trial, that by their silence during renegotiation of the Collective Bargaining Agreement, the Union had ratified the Trust Fund.

The District Court found that a written trust agreement within the meaning of § 302 had not been executed by Union and Management. Therefore, according to the District Court, the Union need not have an equal voice in the operation of the Fund, since the Trust Fund is wholly funded by the Employer. The Court then entered judgment for the Defendants.

The Court of Appeals found that there was indeed ratification of the August 27, 1962 Trust Agreement pursuant to Florida Law. See, *G. & M. Restaurants Corp. v. Tropical Music Service, Inc.*, 161 So.2d 556 (Fla. 2nd DCA 1964). Ratification resulted from the acts of the Union representatives. There was no requirement that the Union members take any action to ratify the Trust Fund Agreement. The Court found that the August 27th Trust Agreement is the one required

by the Collective Bargaining Agreement. It found that the Trust Agreement met all the requirements of § 302 of the LMRA. The Court, finding § 10 of the Trust Agreement in violation of § 302(c)(5)(B) of the Act, reversed the ruling of the District Court.

Petitioners then filed for a Writ of Certiorari to this Court. Respondents, for reasons which will be set forth, oppose the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

The Decision Of The U. S. Court Of Appeals, Fifth Circuit, Interpreting § 302 Of The Labor-Management Relations Act Of 1947 Is A Correct Interpretation And Need Not Conflict With The Opinion Of The United States Court Of Appeals, Second Circuit.

The Fifth Circuit Court of Appeals found that the August 27th Trust Agreement has been ratified by the parties in accordance with Florida Law. By their actions, the Union and Employer Trustees have consistently indicated that the August 27th Trust Agreement is the one required by the Collective Bargaining Agreement. There was a clear intent, as indicated by the actions of the parties, to establish a Trust Fund within § 302 of the LMRA. Equal representation is required in the administration of the Trust Fund pursuant to the Act. There was equal participation in all aspects except for the hiring of the Fund's staff. Since the Committee that administered the Trust Fund was structured so as to insure the equal representation of the parties, it is clear that the intent was to establish a Taft-Hartley Trust Fund.

The Court below found that the case at Bar is in conflict with the decision of another Court of Appeals. See, *Independent Association of Mutuel Employees of New York State v. New York Racing Association*, 398 F.2d 583 (2nd Cir. 1968). Petitioners contend that the conflict perceived by the Court below should be the basis of review by this Court.

However, even if the results reached by the Courts of the Fifth Circuit and that of the Second Circuit conflict, the conclusions arise out of different factual backgrounds. There was no apparent intent in *Mutuel Employees, supra*, to establish a § 302 Trust. In that case, a Trust Fund was established by the Employer and although Union representatives were appointed as Committee Members, they were not given equal participation in the control of the Fund. Since there was no intent to give Union members an equal voice, that Fund was not a Taft-Hartley Trust Fund. Instead, Union members were simply gratuitously appointed by the Employer to the Committee of a Trust Fund set up by Management and the procedures required by § 10 of the LMRA were not invoked.

In the case at Bar, a Taft-Hartley Trust Fund was found to have existed and thus the Fund is within § 302 of the Taft-Hartley Act. It is certain that had the *Mutuel Employees* Court been faced with the actual situation presented here, i.e., there is equality of management except as to certain employees, it would have made the same ruling as did the Fifth Circuit.

Conversely, it is speculation to conclude that if presented with an identical factual situation as that in *Mutuel Employees, supra*, the Fifth Circuit would

have reached a decision contrary to that of the Second Circuit. Any indication of that occurrence emerges from the dicta of the Fifth Circuit Opinion and is inappropriate for review here because of the factual differences between the two cases. Thus, the different conclusions which the Courts reached are largely grounded in the facts and their theoretical differences are more apparent than real. Absent a factual situation that clearly presents a conflict in the interpretation of the Statute, review by this Court is unnecessary.

II

Even If The Court Does Find A Conflict In The Decisions Of The United States Courts Of Appeals, Second Circuit And The Fifth Circuit, This Matter Is Not A Vital One Nor Is It Of Great Importance.

In the thirty years since the enactment of the LMRA, in 1947, only one other case has dealt with the issue decided below. See, *Independent Association of Mutuel Employees, supra*. That case was decided by the Second Circuit in 1968 and there has been no similar case until the present time. Thus, no vital controversy of import beyond the particular facts and parties involved here is being presented. One of the major purposes of Supreme Court review by Certiorari is the setting of precedent in matters that are current and pervasive. Such matters are not found here. Rather, the issue before the Court is one which has arisen twice in the thirty years since the passage of the Statute and is unlikely to arise again before another thirty years have passed.

Here, there is no hindrance to the effective administration of § 302 caused by the lower Court decision. The issue is a narrow one, unlikely to affect the application of the LMRA. Nor are the decisions of the two Courts of Appeals so inconsistent in theory as to leave the meaning and intent of the Statute in a state of confusion. Rather, the Fifth Circuit has correctly interpreted the Statute in a factual situation which Respondents contend is unlike that of *Mutuel Employees, supra*. Where no problem of immediate importance is presented before this Court, the decision of the Fifth Circuit is proper and need not be reviewed.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted

Joseph H. Kaplan
Joseph C. Segor
KAPLAN, DORSEY, SICKING
& HESSEN, P.A.
Attorneys for Respondents
P. O. Drawer 520337
Miami, Florida 33152
(305) 325-1661

Joseph C. Segor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Response to Petition for Writ of Certiorari were mailed this ____ day of June, 1977 to Steadman S. Stahl, Jr., Esq., attorney for Petitioners, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

Joseph C. Segor